

No. 15326

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United States  
Court of Appeals  
for the Ninth Circuit

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RALPH E. WILLIAMS, as Trustee of the Estate  
of FUTURE MFG. COOPERATIVE, INC.,  
Bankrupt,

Appellant,

vs.

LEAMON T. McDONALD,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Northern District of California  
Southern Division.

FILED

DEC 14 1956

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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### Witnesses:

Aaronson, Daniel, Jr.

—direct .....

McDonald, Leamon T.

—direct .....



## NAMES AND ADDRESSES OF COUNCIL

SHAPRO & ROTHSCHILD,

155 Montgomery Street,

San Francisco,

For Appellant.

L. T. McDONALD,

19160 Stevens Creek Road,

Cupertino, California,

(Pro Per),

For Appellee.





In the Southern Division of the United States District Court for the Northern District of California

No. 35489—Civil Action

RALPH E. WILLIAMS, as Trustee of the Estate  
of Future Mfg. Cooperative, Inc., Bankrupt,  
Plaintiff,

vs.

LEAMON T. McDONALD,  
Defendant.

## COMPLAINT TO RECOVER PREFERENCE

Complaining of defendant above named, plaintiff alleges:

### I.

That this Court has jurisdiction over the subject matter of this action under the provisions of Section 60(a)-(b) of the Bankruptcy Act.

### II.

That heretofore and on the 30th day of January, 1956, Future Mfg. Cooperative, Inc., filed in the above-entitled court a voluntary Petition in Bankruptcy; and that thereafter, by order of the above-entitled court regularly made and entered in said bankruptcy proceedings, said Future Mfg. Cooperative, Inc., was duly adjudged a bankrupt; and that thereafter such proceedings were regularly and duly had before the above-entitled court as that

plaintiff was duly appointed as and thereafter duly qualified as and ever since has been, and still is, the duly appointed, qualified, and acting Trustee of the estate of the bankrupt above named.

### III.

That within four months of the filing of said Petition in Bankruptcy, and more particularly on or about the 4th day of January, 1956, said bankrupt, while then and there insolvent, transferred a portion of its property, to wit: The sum of One Thousand Seven Hundred Seventy-six (\$1,776.00) Dollars to Defendant; and that at the time of the aforesaid transfer Defendant was a general and wholly unsecured creditor of said transferor; and that said transfer was so made with the intent to and with the effect of preferring Defendant over the other then existing and wholly unsecured creditors of said transferor in that the effect of said transfer was to enable said Defendant to obtain payment of a greater percentage of his claim against said transferor than did other of his creditors of the same class; and that at the time of the said transfer and payment, Defendant well knew and/or had reasonable cause to believe that said transferor was insolvent and that the effect of said transfer and payment would be to so enable said Defendant to obtain such preference.

### IV.

That other general and wholly unsecured creditors of said bankrupt have heretofore proved and filed against its bankrupt estate their several

proofs of claim, and that the assets of said estate are insufficient to pay such unsecured claims of said creditors in full.

V.

That notwithstanding that the Plaintiff demanded said sum of One Thousand Seven Hundred Seventy-six (\$1,776.00) Dollars, Defendant has failed, refused and neglected and still fails, refuses and neglects to pay said sum to Plaintiff.

Wherefore, Plaintiff prays judgment against the above-named Defendant in the sum of One Thousand Seven Hundred Seventy-six (\$1,776.00) Dollars, plus legal interest thereon from and after January 4, 1956, and for Plaintiff's costs herein incurred, and for all proper relief.

/s/ RALPH E. WILLIAMS.

SHAPRO & ROTHSCHILD, and  
JAMES M. CONNERS.

Duly verified.

[Endorsed]: Filed May 17, 1956.

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[Title of District Court and Cause.]

COMPLAINT TO RECOVER PREFERENCE  
ANSWER

L. T. McDonald answers the first cause of action as follows:

L. T. McDonald denies the alleges of the first cause of action and denies that any sum at all is due from him to the Plaintiff.

L. T. McDonald answers the second cause of action as follows:

Wherefore L. T. McDonald, prays that judgment will be for him with his costs.

/s/ LEAMON T. McDONALD.

Defendant,

Duly verified.

[Endorsed]: Filed June 23, 1956.

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[Title of District Court and Cause.]

### ORDER FOR JUDGMENT

Judgment may enter for defendant upon findings, presented pursuant to the rules.

Dated: August 2, 1956.

/s/ LOUIS E. GOODMAN,

United States District Judge.

[Endorsed]: Filed August 3, 1956.

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[Title of District Court and Cause.]

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having regularly come on for trial on the 2nd day of August, 1956, before

the above-entitled Court, sitting without a jury, Plaintiff being represented by Messrs. Shapro & Rothschild and James M. Conners, Esq. (Daniel Aronson, Jr., Esq., appearing), his attorneys, and Defendant, Leamon T. McDonald, appearing in person and not being represented by counsel, and the Court having heard the testimony both oral and documentary adduced by the respective parties, having examined the witnesses, and the cause having been duly argued and submitted for decision and the Court being fully advised in the premises, now makes these Findings of Fact and Conclusions of Law as follows:

### Finding of Fact

#### I.

That each and all of the allegations contained in paragraphs I, II, IV and V of Plaintiff's Complaint are true.

#### II.

That each and all of the allegations contained in paragraph III of said Plaintiff's Complaint are true, saving and excepting the words "Defendant well knew and/or had reasonable cause to believe that said transferor was insolvent." and that said exception is untrue.

### Conclusions of Law

#### I.

That the payment by the Bankrupt to the Defendant of the sum of \$1,776.00 within four months

next preceding the filing of the petition in bankruptcy by said Bankrupt on the 30th day of January, 1956, was not a voidable preference under Section 60(b) of the Bankruptcy Act, and that said Defendant did not have knowledge or reasonable cause to believe that said Bankrupt was insolvent at the time of said payment.

## II.

That Plaintiff is not entitled to recover the said sum of \$1,776.00 from Defendant.

Let judgment be entered accordingly.

Dated in San Francisco in said District this 27th day of August, 1956.

/s/ LOUIS E. GOODMAN,  
District Judge.

Lodged August 15, 1956.

[Endorsed]: Filed August 27, 1956.



In the Southern Division of the United States District Court for the Northern District of California

No. 35489

RALPH E. WILLIAMS, as Trustee of the Estate  
of FUTURE MFG. COOPERATIVE, INC.,  
Bankrupt,

Plaintiff,

vs.

LEAMON T. McDONALD,

Defendant.

### JUDGMENT

The above-entitled action having regularly come on for trial on the 2nd day of August, 1956, before the above-entitled Court, sitting without a jury, Plaintiff being represented by Messrs. Shapro & Rothschild and James M. Connors, Esq. (Daniel Aronson, Jr., Esq., appearing), his attorneys, and Defendant, Leamon T. McDonald, appearing in person and not being represented by counsel, and evidence, both oral and documentary, having been adduced by the respective parties upon the issues joined by the Complaint of Plaintiff herein and the Answer thereto filed herein by said Defendant, and the matter having been duly argued and submitted to the Court for decision and the Court having heretofore made, signed and filed herein its Findings of Fact and Conclusions of Law, and good cause appearing therefore,

It is hereby ordered, adjudged and decreed that judgment be entered for the Defendant herein, that Plaintiff take nothing by his complaint and that Defendant recover his costs herein incurred, and taxes at the sum of \$———.

Dated at San Francisco in said District this 27th day of August, 1956.

/s/ LOUIS E. GOOMAN,  
District Judge.

Lodged August 15, 1956.

[Endorsed]: Filed and entered August 27, 1956.

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that Ralph E. Williams, as Trustee of the Estate of Future Mfg. Cooperative, Inc., Bankrupt, Plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 27, 1956.

Dated: This 29th day of August, 1956.

SHAPRO & ROTHSCHILD, and  
JAMES M. CONNERS,

By /s/ DANIEL ARONSON, JR.  
Attorneys for Plaintiff.

[Endorsed]: Filed August 29, 1956.



The United States District Court Northern District  
of California, Southern Division

No. 35489

RALPH E. WILLIAMS, as Trustee of the Estate  
of FUTURE MFG. COOPERATIVE, INC.,  
Bankrupt,

Plaintiff,

vs.

LEAMON T. McDONALD,

Defendant.

Before: Hon. Louis E. Goodman, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

SHAPRO & ROTHSCHILD, by

For the Defendant:

DANIEL AARONSON, JR.,

In Propria Persona.

Thursday, August 2, 1956

The Clerk: Williams vs. McDonald.

Please state your appearances for the record.

Mr. Aaronson: Daniel Aaronson, Jr., of Shapro  
& Rothschild appearing for plaintiff.

The Clerk: Please state your name.

Mr. McDonald: Leamon Thomas McDonald.

The Court: You do not have an attorney, Mr.  
McDonald?

Mr. McDonald: No, sir.

The Court: You have not had an attorney at all in this proceeding?

Mr. McDonald: No, sir.

The Court: Do you want to proceed with this case without an attorney?

Mr. McDonald: Yes, sir.

The Court: All right; you may sit down.

Mr. Aaronson: May I first thank the Court for inconveniencing itself to get this matter disposed of?

This is a complaint to recover preference, brought by the Trustee of the Estate of Future Mfg. Co-operative, Inc., Bankrupt, against Leamon T. McDonald, who was the president of the bankrupt corporation. We are concerned with the sum of \$1,776, which is the alleged preference received by Mr. McDonald. [3\*]

The trustee plaintiff will call Mr. McDonald as a witness.

#### LEAMON T. McDONALD

The defendant herein, called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name for the record.

A. Leamon Thomas McDonald.

#### Direct Examination

By Mr. Aaronson:

Q. Mr. McDonald, you are the defendant in this action?      A. Yes, sir.

(Testimony of Leamon T. McDonald.)

Q. And you were the president of the bankrupt corporation?      A. Yes, sir.

Q. And you were also the general manager and the operator of the business?      A. Yes, sir.

Q. And the business of the corporation was destroyed by fire, was it not?      A. Yes, sir.

Q. And when was that?

A. On January 2nd, this year.

Q. That was the morning of January 2nd?

A. Yes, sir.

Q. And on or about the 3rd or 4th of January you received a certain sum of money in excess of \$1900? [4]      A. Yes, sir.

Q. What did that money represent?

A. It represented the receipts for the past week of the store.

Q. Of the operation of the business before the fire?      A. Yes, sir.

The Court: What was the date? I didn't get the date.

Mr. Aaronson: That he received the money, your Honor?

The Court: Yes.

Mr. Aaronson: It was the 4th of January.

The Witness: About the 4th of January.

The Court: And when was the fire?

Mr. Aaronson: On the 2nd.

The Court: All right; go ahead.

Q. (By Mr. Aaronson): You previously testified under oath before the referee in the bankruptcy proceeding; is that correct?      A. Yes.

(Testimony of Leamon T. McDonald.)

Q. And you furnished a statement concerning the disposition of those 1900 odd dollars?

A. Yes.

Q. And it was your testimony that of the 1900 odd dollars you took \$1,776 for yourself for back wages?

A. Yes, sir.

Q. Those were for wages prior to the [5] fire——

A. Yes, sir.

Q. ——for which you had not been paid? Then on the 30th of January, 1956, you filed for the corporation, through your attorneys, a petition in bankruptcy.

A. Yes, the Board of Directors did, yes, sir.

Q. I will show you the petition and ask you if that bears your signature.

A. Yes, sir.

Q. And at the time that you filed the petition you filed only a list of your creditors?

A. Yes, sir.

Q. And then at a later date the corporation filed the Schedules A and B showing the assets and liabilities?

A. Yes, sir.

Mr. Aaronson: If I may, your Honor, I will offer in evidence the petition and schedules as Trustee's No. 1.

The Court: All right.

The Clerk: Plaintiff's Exhibit No. 1 introduced and filed into evidence.

(Whereupon schedules and petition referred to above were received in evidence and marked Plaintiff's Exhibit No. 1.)

(Testimony of Leamon T. McDonald.)

Q. (By Mr. Aaronson): The business did not operate after the fire; is that correct, Mr. McDonald?  
A. No, sir. [6]

Q. And so the situation with regard to the finances of the corporation on January 4th was identical with January 30th.  
A. Yes.

Mr. Aaronson: I will call your Honor's attention to the summary page of the schedule indicating total liabilities of \$83,147.14 and assets of \$44,004.96.

The Court: What kind of a business was it?

Mr. Aaronson: A grocery store.

The Court: Grocery business?

The Witness: Yes.

The Court: Retail or wholesale grocery?

A. Retail.

Q. (By Mr. Aaronson): Under date of April 18th, Mr. McDonald, you received a letter signed by myself demanding repayment of the \$1,776.

A. Yes, sir.

Q. And you did not reply to that?

A. No, sir.

Q. The next action you knew was when the complaint was served upon you?  
A. Yes, sir.

Mr. Aaronson: I have nothing further of this witness.

The Court: Did you wish to ask yourself any questions or make a statement about the matter? [7]

The Witness: Your Honor, I would like to make a statement about the matter.



(Testimony of Leamon T. McDonald.)

Your Honor, I am being the president of the organization—it was a co-op—and chairman of the Board of Directors and also the employee in the store.

April 1st of last year or thereabouts we started the business. The Board of Directors had me leave my present job—I am a refrigeration serviceman—and take over the management in the store and take care of the purchasing in the store. I was supposed to get \$75 a week and my groceries, \$25. I have seven in the family.

The wife and I worked many long, hard hours for the store, as the store was new, and we remodeled and brought it up. And I filed an income tax for this year. I had taken, including the \$1700, \$2700 less my \$25 for groceries.

But when the fire happened, we talked it over with the secretary and treasurer and Mr. Jim Brand, Vice-President of the corporation who handled all the money and paid all the bills. And I hadn't been paid and my family had gone without in order to see that the creditors and the employees—the other employees—got paid. And we paid all the labor due the manager and assistant manager we had in the store, and the helper, and I take the rest for my pay. So I took it.

We hadn't planned any bankruptcy whatever. It hadn't even been discussed with anyone that I know of. Now we have [8] a Board of Directors. There was a little dissension in the Board of Directors, but I had made arrangements with our at-

(Testimony of Leamon T. McDonald.)

torney, Mr. Reinheimer, already to see if we couldn't get the store rebuilt and get back, and I had talked to the main creditors, the grocery people and the fixture company.

The fixtures were redeemable; in other words, they could be put back in order, and the groceries we had planned to sell on a fire sale and they would replace them.

All right. I had stood guard on the grocery store for about two weeks after the fire in order—it had been raining very heavy, and the inventory people couldn't get in there to take inventory as fast as they thought they could. Well, as soon as the inventory, we were going to put a fire sale on, sell it out and try to get back into business.

The Court: Was there insurance?

A. Yes, there was insurance, some sixteen or eighteen thousand dollars; I don't remember right now.

All right. Then we had the attorney working on it to see how we stood and how the owner of the property felt about putting us back in, and about two weeks—the next thing I knew, the attorney had called a meeting. We had gone down and set aside a sum of money by a resolution setting aside the attorney's fees and a fee for taking inventory, and we turned it over to the attorneys to administer the estate; in other words, to see that the money [9] was handled properly and the creditors got their share.

Myself, I had no intentions of going through bankruptcy, and I think the majority of the direc-

(Testimony of Leamon T. McDonald.)

tors had no intentions, because we are laymen, we know nothing about bankruptcy proceedings and what it held; we were depending on our attorney to a degree.

About two or three weeks later I was confronted with the papers that I have my signature on there now to file bankruptcy. I was not notified of the hearing whatsoever. The attorney called a meeting on Sunday and he had the—had all the other directors agreeing that they should homestead their homes, they should pay him \$25 for homesteading their homes, and they should pay him \$150 apiece for taking them through personal bankruptcy, which this has never happened.

All right. Here come the secretary and treasurer with the papers for me to sign, and I knew nothing of it whatsoever. I refused to sign them, because we hadn't planned it like that. So I went the papers back, and about the next night or two here come Reinheimer out to my house with the papers. While he is trying to convince me that I should sign the bankruptcy papers and we should put it through bankruptcy, why, the secretary and treasurer comes in. And when the secretary and treasurer found out that he had called a meeting without my knowledge—he had told the directors that I knew all about it, which I knew nothing—he apologized before [10] my wife, and the secretary and the treasurer and Mr. Jim Brand, who was here with me a little bit ago, said that they had to protect themselves. I mean that is pretty rotten, in my opinion, without



(Testimony of Leamon T. McDonald.)

any discussion or without letting us on the Board of Directors discuss it after him talking to us. He just more or less scared them into it.

Well, two or three days went by, and after I had talked to a few of the directors, I just gave and said, "O.K., we will put it through bankruptcy," because I had worked hard; my family had gone without all those months in order to try to build the business, to pay our way.

I have the receipts for the \$1700, and they are all dated that date. I had to move from my home. I had to have a place to move immediately. My car had been——

The Court: What is this \$1700?

A. Wages—back wages.

Q. That hadn't been paid?

A. That hadn't been paid. I had put it back to cash the checks and to see that the other employees got paid.

Q. How much time did that cover?

A. Well, that covered off and on from the time I went to work.

Q. You mean you hadn't drawn your full salary, is that what you mean?

A. Yes. Sometimes I let my whole week go by without [11] drawing anything if I could get by.

Q. Is there any record of the payments that were made?      A. Yes.

Q. Where was that?

A. With the books, and they have the books. My

(Testimony of Leamon T. McDonald.)

record of the money that was paid me and the money that was taken is right in there.

Q. This \$1700 was the balance that was owing you that had not been paid over various periods of time?

A. That was a portion of it. To figure it up, the amount of money that I had coming, that didn't cover it all by any means.

Q. You had more than \$1700 coming to you in wages? A. Yes, and \$75 a week.

The Court: Anything else?

A. Well, that's it.

The Court: Do you want to ask any questions?

Mr. Aaronson: Yes, I would, your Honor.

Q. Mr. McDonald, were you advised by your counsel not to convert the \$1900 to your use?

A. No, sir.

Mr. Aaronson: With regard to the time element, your Honor, the exhibits will show that they were subscribed and sworn to by Mr. McDonald on the 16th of January, and that the resolution in support of the petition was adopted on the [12] 15th of January. So the time element was less than two weeks after the fire, and there was one day intervening between the time the schedules were filed.

I might say just for the record that the petition was actually presented on the 16th or 17th—the 17th or 18th, rather—but Mr. Reinheimer presented only the petition without the supporting list of creditors, and that involved the delay to the 30th.

Q. Prior to the time that the petition was filed,

(Testimony of Leamon T. McDonald.)

Mr. McDonald, didn't you have conversation with Mr. Reinheimer concerning the question of the corporation filing a voluntary petition in face of the fact that the creditors were going to file an involuntary?

A. We had general discussions about the business and its operations, but nothing concerning a definite bankruptcy whatsoever. The only that that may have been discussed about bankruptcy was as a possible way out, and the brief talks that I may have had with him, in trying to remember the exact words, I think I said, "Well, we'll see" or "We'll think about it," because we had no intentions of bankruptcy because we had this fire sale coming up and everything else.

Mr. Aaronson: I have no further questions.

The Court: Who put up the money for this business?

A. Well, the money was largely put up by the directors, as it was a co-op, you know. The people—there wasn't a lot [13] of money put up; what money was put up—I put up all that I could get together—

Q. How many people were joined in this co-op?

A. There were about 50 active people.

Q. 50? A. Yes.

Q. And did every one of the 50 put up some money?

A. Some, yes; anywhere from 10 to, oh, maybe a hundred dollars; I mean from time to time.

Q. What was the total amount that was invested

(Testimony of Leamon T. McDonald.)

in the business by everybody, approximately? Do you know that?

A. Well, I imagine there is probably around—actual cash, maybe three or four thousand dollars. I doubt if there was any more than that.

Q. With that capital how were you able to start the grocery business? Did you get credit?

A. Well, here is what happened, sir. The store that we had went into the hands of the receivers, and the manager of the store who had the lease was a relative of one of the Board of Directors. So he approached us in taking it over. So we went to the receivers here in San Francisco and they consented to changing hands. Let's see—we put in \$3,000 cash——

Q. It was an operating grocery store?

A. Yes. [14]

Q. Who was operating it?

A. Mr. Bill Shrader.

Q. And he was in trouble?

A. Yes, he was in trouble and I'll—the son-in-law of Mr. Bill Shrader put up \$3000 in order to move into the grocery store. I mean that was the agreement between the receivers. And then the balance that was in the hands of the receiver was to be paid off at a certain date, or as we went along.

Q. When did you go in there?

A. In April of last year.

Q. Of 1955? A. Yes.

Q. How many employees were there?

(Testimony of Leamon T. McDonald.)

A. Well, myself and two grocery employees and a butcher—one butcher.

Q. Did those three also contribute to it?

A. No, they were employees.

Q. They were just employees?

A. They were paid.

The Court: Anything else you want to bring out?

Mr. Aaronson: Not from this witness, your Honor.

The Court: That is all. You can step down.

(Witness excused.)

Mr. Aaronson: I would like to be sworn, your Honor. [15]

DANIEL AARONSON JR.

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Please state your name for the record.

A. Daniel Aaronson, Jr.

The Witness: I have, your Honor, in my possession here 43 claims, all original claims on file with the referee in bankruptcy. I had intended to obtain a certificate to place in evidence from the referee, but he has been on vacation. So therefore I obtained the original claims filed from the referee, and I have made a list of claims filed to and including January 27, 1956. I have broken them down into three categories: The unsecured claims, the priority tax claims, and priority labor claims.



(Testimony of Daniel Aaronson, Jr.)

I have also made a notation on the list that the time for filing does not expire until September 16th.

I would offer into evidence the claims and ask that the list be substituted in the file.

The Clerk: Plaintiff's Exhibit 2 introduced and filed into evidence.

(Whereupon list of claims was received in evidence and marked Plaintiff's Exhibit No. 2.)

The Court: What is the total?

A. I have the total here. The list of unsecured claims total \$18,784.61; the priority labor claims, \$1,212.85; and the priority tax claims, \$373.82, and the Director of [16] Internal Revenue has not yet filed his claim. We understand it will be a substantial claim.

From the claims that are filed, your Honor, and from Plaintiff's Exhibit No. 1, the schedules, you will observe that there are labor claims which were not paid of a substantial nature, both on a priority basis and unsecured basis. The trustee has received and has on hand only the sum of \$15,740.93, which is the balance that he has in his possession from the proceeds of the insurance policies—the fire insurance policies.

The only items that have been paid so far involved in actual expenses have been the inventory and so on to obtain the monies from the insurance company, and actual court costs, the court reporters on the various hearings heretofore held. It is my

(Testimony of Daniel Aaronson, Jr.)

recollection that we received just under \$16,000 for the total loss.

Q. The insurance companies then were subrogated; they had the right then to dispose of the merchandise?

A. That is correct, your Honor. There was some salvageable merchandise of a value possibly of two or three thousand dollars. It is difficult to definitely ascertain it because the labels were so badly damaged following the fire—the rains continued for some time, and what the fire didn't do the elements did—so we considered that it would be more advantageous to the creditors to take a full settlement and [17] let the insurance company make the salvage rather than our conducting the salvage sale.

Q. So the assets in the hands of the trustee are in sufficiency to pay the presently filed claims plus the expenses of administration? A. They are.

Q. Plus tax claims that have been filed?

A. That is correct, your Honor. The money that we received, insofar as I know at this time—unless further matters develop before the case is closed there will be no further recoveries except a possible recovery in this case, and the monies on hand are insufficient to pay the general secured creditors, without regard to any of the priority claims or expenses of administration.

The Court: Did you wish to ask any questions? You have a right to ask any questions you wish.

Mr. McDonald: Yes, I would just like to ask him—these labor claims that are there, these labor

(Testimony of Daniel Aaronson, Jr.)

claims are filed by the members of the co-op, aren't they, who contributed time rather than as an employee; they put in time perhaps like coming over at night and helping with the groceries? Because all other labor claims were paid.

A. The proof of priority wage debt to which I referred was claim No. 17, which was filed by the Labor Commissioner on behalf of Salmon, nature of work, carpenter; Cantu, grocery [18] clerk; Garcia, grocery clerk; Hale, grocery manager; Hale again as managing clerk; and Gilbert as meat cutter.

The proof of wage debt, the general claim, involves exactly the same people for periods of time more than 90 days prior to the filing of the petition. It is my recollection—may I see Exhibit No. 1, please? From Schedule A-1, all debts listed under priority, Gilbert, Salmon, Cantu, Garcia, McDonald, Brand, Wolf, Hale, Jones—Jones, Floyd and Jones, Shirley. They were all listed as wage claimants.

Q. (By Mr. McDonald): So these were approved and brought to the hearing by the Labor Commissioner and sent down with the proof that these were legitimate claims as wages?

A. Assuming that the Labor Commissioner followed his usual procedure, yes.

Q. I don't recollect having attended any hearing or been notified of any hearing that we owed any wages. Again, those wages are for time that they spent as volunteer and hoped that some time they



(Testimony of Daniel Aaronson, Jr.)

would get paid, because most of them were members——

The Court: They were not regular employees?

Mr. McDonald: A couple of them there are. I recognized the name Garcia; but at the same time he may have come in and did some work. Mr. Hale has no right because he was paid in full.

The Witness: Apparently there is a [19] question.

The Court: These labor claims would affect the result of a deficit.

A. I might say parenthetically, your Honor, insofar as this case is concerned, that at the first meeting of creditors there was, I know, Garcia and at least one of the other labor claimants, that those labor claimants were represented by counsel, and it would be the trustee's position, I am sure, before the Court that these claims be paid on a priority basis, or otherwise there will be a hearing before the referee to determine whether or not they are actually entitled to priority as wages, or as a matter of fact to any claims whatsoever.

I might say, your Honor, I personally placed the list of general unsecured creditors first to show that they would total more than the money spent.

Mr. McDonald: I would like to ask just one more thing. You say that this petition—the resolution was on the 15th and it was signed on the 16th. Do you know what date that could have been?

A. No.

(Testimony of Daniel Aaronson, Jr.)

Q. The meeting was held on Sunday?

A. That is correct. I checked it. The 15th is a Sunday—was a Sunday.

Q. And the papers were brought out to me Monday or Tuesday and I refused to sign. [20]

A. Yes.

Q. The attorney came out a night or two later, and then I finally came to his office and signed. Now how can it be the resolution on Monday and signed on the next?

The Court: What is the date that it was filed?

A. It actually was filed on the 30th, but it was subscribed and sworn to on the 16th. I am taking my information only from the schedules in this court.

The Court: The defendant contends he signed the papers but at a later date.

Mr. McDonald: Yes, I did, sir, because I thought it over——

The Witness: I can't say that.

Mr. McDonald: ——and talked to them about the thing two or three days before I signed. I have a witness right there.

The Court: Is there anything else you wanted to ask him?

Mr. McDonald: I don't think so.

Mr. Aaronson: I have nothing further, your Honor.

The Court: Is that all the evidence?

Mr. Aaronson: That is.

The Court: Mr. Aaronson, there is no evidence

that would justify that this money was taken with knowledge of bankruptcy.

Mr. Aaronson: Insolvency, not bankruptcy. The witness testified that there was no operation subsequent to the fire [21] and that the assets and liabilities of the corporation were exactly the same at the time of the fire, which was before the taking of the money, as they were at the time of the filing of the petition. The schedules show almost two to one on the liability side.

And I might further add that an examination of the B side of the schedules, the assets, will show \$24,000 set up as property—personal property and equipment—of which there was none, other than a few items, which incidentally are listed as amounts unknown, which were not on the premises destroyed by the fire, and also include the \$1,900 that Mr. McDonald got. So if you reduce that, you have 80 odd thousand dollars, less——

The Court: On the figures, yes, but the witness has testified that they thereafter were intending to continue with the business, which would not indicate an insolvency. You put him on. That is his testimony.

Mr. Aaronson: I appreciate that, your Honor; but the question of insolvency is the excess of the liabilities over the assets.

The Court: That is true, but in recovering a preference the burden is to show——

Mr. Aaronson: Reasonable cause to believe they were solvent.

The Court: —reasonable cause to believe that the [22] concern was insolvent.

Mr. Aaronson: Mr. McDonald testified only that they were going to try to continue on, and he was president and operated the business, and he well knew the condition of the business, and that there was no operation, so that the business, as the records show in the schedules, was in exactly the same condition at the time the petition was filed as it was at the time he took the money.

The Court: The only circumstance is that this \$1,700 was paid after the fire when the business was inoperative. That is the only circumstance.

Mr. Aaronson: I might say—

The Court: I have grave doubts as to whether or not there would be a preponderance of evidence that would be sufficient to warrant a finding that that was a preferential payment under the statute. There is a slimness of any evidence except the circumstance that here was a business that was apparently going along, then there was a fire, and then it was closed down for a time, and this man says he needed the money because he had been devoting himself to operating this business, so he took the back salary at that time. I have doubts as to whether or not that circumstance is sufficient to warrant the inference that he took the money at that time with the awareness that the business was insolvent and that the effect of what he was doing was getting [23] a preference over somebody else.

Mr. Aaronson: I think, your Honor, being the president and operator of the business, the general



manager of the business, he was well aware of the condition of the business. On two points the cases are quite clear that an officer of the corporation is presumed to know the condition of the corporation, particularly when he deals with it, and No. 2, that——

The Court: What does the record show as to what this \$1,700—what do the books show as to what it was on payment of?

Mr. Aaronson: The books show nothing as to what it was in payment of, your Honor.

The Court: What do the books shows as to what was owing to him?

Mr. Aaronson: What was owing to Mr. McDonald?

The Court: Yes.

Mr. Aaronson: Leamon T. McDonald, employed as clerk and manager for three months, October 10, 1955, to December 31, 1955, \$375.

The Court: What is that? \$375 owing?

Mr. Aaronson: That is owing, your Honor. I will look further. That was listed under the priority wage—as a priority wage, which it would be for the most part. Actually only two-thirds of that would be on a priority [24] basis.

The Court: At least part of the \$1,700 would have been proper for priority.

Mr. Aaronson: You say would have been proper, your Honor?

The Court: I say at least some part of the \$1,700 if he didn't receive it would have been allowable as a priority.

Mr. Aaronson: As a priority, yes, there is no question about that.

The Court: Isn't there a strong inference from that this this was not a preferential payment, then, within the meaning of the statute?

Mr. Aaronson: No, I don't believe so, your Honor.

The Court: It is some evidence.

Mr. Aaronson: I don't believe so, because in order for him to be paid on a claim filed in bankruptcy proceedings, he would have to surrender any preference he might have received, and if it was for an antecedent indebtedness——

The Court: That is true; but I am speaking now as some evidence on the question of whether or not the intent was to get a preference.

Mr. Aaronson: There is a possibility that a portion of it, perhaps the last week, might not be considered preferential, because he was entitled to take it out week by week. But beyond that, I think it is an antecedent indebtedness [25] for which there must be——

The Court: There is a very slim record here, Mr. Aaronson, and it doesn't seem to me to be sufficient to warrant adjudging a repayment of this as a preference. The only circumstance is that after the fire and before anything further was done, then he received the past due wages that were due him. That is all that the record shows.

Now we would have to indulge in the assumption at that time that that payment was made that the concern was insolvent; that he knew it was insol-

vent; that he took this money and got this money knowing that he was being preferred to other creditors at the time.

Mr. Aaronson: I think that is what the record shows, your Honor, exactly.

The Court: His own testimony doesn't indicate that he had any awareness that there was an insolvency.

Mr. Aaronson: I think his testimony is in conflict with the evidence, your Honor. I appreciate it is a matter of testimony, but the schedules show—it was his testimony that the business conditions did not change from the time of the fire until the time the petition was filed, and these schedules which were subscribed and sworn to and filed, were taken from the books which show the condition at that time, and as I indicated to your Honor, it shows of the \$44,000 on the asset side over \$24,000 is not in existence. [26]

The Court: \$24,000 and what?

Mr. Aaronson: Was not in existence, because it includes some 24,000 odd dollars of equipment and supplies and so on that were destroyed in the fire. It also shows the fire insurance, which is actually the only asset, and it shows the \$1,900 in Mr. McDonald's possession, which it is not.

The Court: Of course the assets might have been more than the insurance money if there was a fire.

Mr. Aaronson: The insurance is on an inventory basis to the full extent of the inventory to I think it is 18,000—it covered up to \$18,000, as I re-

member. The fixtures and equipment not covered by the insurance, except for a few minor items, were all covered by contracts of sales as shown in the schedule, on which there were balances owing.

The Court: What was the liability with respect to those contracts in the event of fire?

Mr. Aaronson: As far as I know, there were no loss payees on those contracts. They might have been covered by their own policies. There have been no proceedings brought to the attention of the trustee that anybody claims the money; in fact, the policies do not show it. We received the money from the insurance company. So I would say if they are not covered by their own insurance, they would be unsecured in these proceedings. Even allowing and saying that they [27] actually contributed to the business \$24,000 plus the fire insurance, which is also shown in the schedules, which still have almost two to one liabilities over the assets—a condition which did not change at any time from prior to the time he took the money to the time of the bankruptcy.

The Court: That may be so, but the testimony was he didn't take that point of view until later on when he agreed to join in the petition for insolvency as the only thing left to be done. Theoretically, you can argue as you have——

Mr. Aaronson: That's it.

The Court: ——that since he testified that the assets were the same and the liabilities were the same on the date the bankruptcy petition was filed as they were on the day that he received the money,



that, theoretically, the argument is that he must have been aware of that condition.

Mr. Aaronson: As the president of the concern.

The Court: His testimony is, however—and it is uncontroverted—that he didn't want to go into bankruptcy at the time; that he was opposed to it, and that finally he did.

Mr. Aaronson: Yes.

The Court: I mean, that is his testimony.

Mr. Aaronson: His testimony was that they thought——

The Court: The bankruptcy petition was not filed until the 16th or 17th, I think.

Mr. Aaronson: It actually wasn't filed until the 30th. [28] The resolution was adopted on the 15th.

The Court: Yes.

Mr. Aaronson I also know why it was adopted, but I think that is a matter that is not involved here. It was his testimony, your Honor, that they were going to try to work it out and have a fire sale. That was his testimony. It is uncontroverted because I wasn't present at any of the meetings—they were going to attempt to continue and have a fire sale and work it out with the creditors and continue. Of course it was our contention that what the intentions of the parties are, the good or bad intentions of the parties, is not an element to be considered. It is purely a question of Whether or not the bankruptcy act was violated——

The Court: It is a question of whether or not there was knowledge——

Mr. Aaronson: ——and it is our contention that

it was, because he was president and general manager and he well knew the condition of the business.

The Court: I take it the matter will be submitted. You have no further evidence?

Mr. Aaronson: I have nothing further.

The Court: You have testified in the case.

I would like to look at the schedules a little more carefully, so I will mark the matter submitted.

Mr. Aaronson: Very well. Thank you.

[Endorsed]: Filed October 3, 1956. [29]

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[Title of District Court and Cause.]

### CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Complaint.

Answer of Defendant.

Order for Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Designation of Record on Appeal.

Reporter's Transcript of Proceedings, August 2, 1956.

Plaintiff's Exhibits 1 and 2.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of October, 1956.

C. W. CALBREATH,

Clerk,

By /s/ MARGARET P. BLAIR,

Deputy.

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[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1956

May 17—Filed complaint—issued summons.

June 23—Filed answer of defendant.

July 2—Ordered for trial August 2, 1956.

Aug. 2—Court trial. Evidence and exhibits introduced, arguments heard and case submitted.

Aug. 3—Filed order for judgment for defendant. Counsel to present findings, conclusions and a form of judgment.

Aug. 27—Filed findings of fact and conclusions of law.

Aug. 27—Entered judgment—filed Aug. 27, 1956—for defendant, and for costs.

Aug. 29—Filed notice of appeal by plaintiff.

Aug. 29—Filed appellant's designation of record on appeal.

Oct. 3—Filed reporter's transcript of proceedings  
Aug. 2, 1956.

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[Endorsed]: No. 15326. United States Court of Appeals for the Ninth Circuit. Ralph E. Williams as Trustee of the Estate of Future Mfg. Cooperative, Inc., Bankrupt, Appellant, vs. Leamon T. McDonald, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 8, 1956.

Docketed October 15, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 15326

RALPH E. WILLIAMS, as Trustee of the Estate  
of FUTURE MFG. COOPERATIVE, INC.,  
Bankrupt,

Appellant,

vs.

LEAMON T. McDONALD,

Appellee.

APPELLANT'S CONCISE STATEMENTS OF  
POINTS TO BE URGED ON APPEAL

Comes now Ralph E. Williams, Appellant herein, and in accordance with Rule 17(6) of the Rules and Practice of the United States Court of Appeals for the Ninth Circuit specifies the following as a concise statement of the points on which he intends to rely on this appeal from the Judgment made and entered by Hon. Louis E. Goodman, Judge of the United States District Court for the Northern District of California, on August 27, 1956, and more particularly specified and described in Notice of Appeal heretofore filed with the Clerk of said District Court on August 29, 1956, as follows:

That the conclusions of law No. 1 and 2 are not supported by the evidence and are contrary to the law in that

I.

That the District Court in said Judgment erred in finding that the Defendant did not have knowl-

edge, or reasonable cause to believe, that the bankrupt was insolvent at the time of the payment.

## II.

That the District Court in said Judgment erred in holding that Plaintiff could not recover from Defendant the alleged preferential payment.

Dated: October 11, 1956.

Respectfully submitted,

SHAPRO & ROTHSCHILD and  
JAMES M. CONNERS,

By /s/ DANIEL ARONSON, JR.,  
Attorneys for Appellant, Ralph E. Williams, as  
Trustee of the Estate of Future Mfg. Coopera-  
tive, Inc., Bankrupt.

[Endorsed]: Filed October 12, 1956.

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